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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re KEVIN W., a Person Coming Under  
the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIN W.,

Defendant and Appellant.

D038665

(Super. Ct. No. J192635)

APPEAL from an order of the Superior Court of San Diego County, John L.  
Davidson, Judge. Affirmed.

The juvenile court declared Kevin W. a ward (Welf. & Inst. Code, § 602) after  
entering true findings he committed assault with a deadly weapon and by means of force

likely to cause great bodily injury (Pen. Code, § 245, subd. (a)(1)),<sup>1</sup> battery on school property (§ 243.2), and battery (§ 242). The court also found the crimes were committed because of the victim's race or sexual orientation (§ 422.7, subd. (a)). It placed Kevin on probation. Kevin contends sufficient evidence does not support the finding he committed the crimes because of the victim's race or sexual orientation.

### FACTS

On July 21, 2000, a group of students at Montgomery Middle School attacked a classmate, Benjamin L. A rumor had been going around that Benjamin was going to be beaten up that day. When he approached the bicycle racks after school, a group of students approached him. He turned around and Kevin tripped him and pushed him down. While Benjamin was on the ground, Kevin and others in the group surrounded and kicked him. While Benjamin was being kicked, several people in the group yelled sexual orientation insults and racial epithets at Benjamin.

### DISCUSSION

We will affirm a juvenile court order supported by substantial evidence. (See *People v. Johnson* (1980) 26 Cal.3d 557, 576.) We must review the entire record in the light most favorable to the order below and presume in support of the order the existence of every fact the trier could reasonably deduce from the evidence. (See *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; *In re Roderick P.* (1972) 7 Cal.3d 801, 808-809.)

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

Section 422.7 makes a misdemeanor that causes physical injury a wobbler if the crime is committed "for the purpose of intimidating or interfering with [another] person's free exercise or enjoyment of any right . . . , and because of the . . . person's race, color, religion, ancestry, national origin, disability, gender, or sexual orientation." As Kevin accurately points out, to prove a violation of section 422.7 the People must present evidence the person charged had the specific intent to violate a person's right and evidence that bias was a substantial factor motivating the crime. (See *In re M. S.* (1995) 10 Cal.4th 698, 713, 719.) Kevin does not argue that the record lacks substantial evidence that he specifically intended to interfere with Benjamin's freedom when he was knocked to the ground and beaten. Rather, Kevin argues the record lacks evidence that bias motivated the assault.

A finding that a defendant had a particular mental state may rest upon circumstantial evidence. (*People v. Mitchell* (1962) 209 Cal.App.2d 312, 321.) Kevin's motivation for engaging in the attack on Benjamin is inferred from all the facts and circumstances disclosed by the evidence. Where the evidence is sufficient to justify a reasonable inference that such motivation existed, the order may not be disturbed. (*People v. Clark* (1969) 268 Cal.App.2d 293, 296.) Here, Kevin testified he was 15 feet away and did not touch Benjamin when he fell to the ground and was beaten. The victim and an eyewitness testified to the contrary. Because credibility determinations are up to the trial court (*People v. Thornton* (1974) 11 Cal.3d 738, 754, disapproved on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684), the record supports a finding that Kevin tripped Benjamin, pushed him down, and kicked him. Because there is

evidence that the assailants made sexually and racially derogatory remarks to Benjamin before the incident, all the assailants were of a different race than Benjamin, and while kicking him continued to make sexually and racially derogatory remarks, there is substantial evidence the crimes were motivated by race and sexual orientation bias.

Relying primarily on *In re Michael B.* (1975) 44 Cal.App.3d 443, defense counsel also argues there was not substantial evidence that Kevin was competent at the time of the incident. Section 26 provides that a child under the age of 14 is not capable of committing a crime unless it is clear that he knew the wrongfulness of the act charged. Noting the importance of the minor's age, experience, and knowledge, in *In re Michael B.*, *supra*, 44 Cal.App.3d at pages 445-446, the reviewing court found substantial evidence did not support a finding a nine-year-old child was competent to understand the wrongfulness of an auto burglary even though he told the arresting officer he knew it was wrong to break into cars and steal. Unlike Michael B., Kevin was 12, not nine, when Kevin took part in the group beating of Benjamin. Kevin does not argue he lacked knowledge that it is wrong to commit an assault and battery, but claims the record lacks evidence he knew it was wrong to commit the crimes because of racial or sexual orientation bias. It appears he is mistaken as to the requirement of section 26. In determining competence, the question is whether he knew his conduct was wrong (*In re Billy Y.* (1990) 220 Cal.App.3d 127, 130), rather than whether he understood the intricacies of the law he broke. (See *In re Harold M.* (1978) 78 Cal.App.3d 380, 388 [court rejects claim that awareness of wrongfulness of substantive crimes does not show awareness of wrongfulness of conspiring to commit those crimes]). Kevin told Officer

Ritter he knew the difference between right and wrong and that is wrong for people to "jump" another person. Given Kevin's awareness of the earlier racial and sexual orientation epithets that had been directed against Benjamin and the racial and sexual orientation epithets shouted during the assault, it is reasonable to assume that Kevin was aware it was wrong to knock down and beat another person because of the person's race or sexual preference. The trial court did not err in making an implied finding that Kevin was competent to commit the crimes.

#### DISPOSITION

The order is affirmed.

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O'ROURKE, J.

WE CONCUR:

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HUFFMAN, Acting P. J.

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McDONALD, J.